

# SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • FAX: (415) 352-3606 • <http://www.bcdc.ca.gov>

**TO:** All Commissioners and Alternates

**FROM:** Will Travis, Executive Director (415/352-3653 [travis@bcdc.ca.gov](mailto:travis@bcdc.ca.gov))  
Howard Iwata, Assistant Executive Director (415/352-3639 [howardi@bcdc.ca.gov](mailto:howardi@bcdc.ca.gov))

**SUBJECT: Approved Minutes of August 7, 2003 Commission Meeting**

1. **Call to Order.** The meeting was called to order by Chair Barbara Kaufman at the Port of San Francisco Board Room, Ferry Building, Second Floor, San Francisco, California at 1:00 p.m.

2. **Roll Call.** Present were: Chair Kaufman, Vice Chair Halsted, Commissioners Bates, Bell, Cutler (represented by Alternate Leonard), Fong, Gordon (represented by Alternate Hill), Kniss (represented by Alternate Carruthers), Kondylis, Lai-Bitker, Lundstrom, McLeod, Gus Morrison, Rice Oliver, Rippey, Rose, Ross (represented by Alternate Garlinghouse), Sweeney, and Waldeck.

Not Present were: Sonoma County (Brown), Contra Costa County (Gioia), Department of Finance (Klass), Association of Bay Area Governments (Leal), Governor's Appointee (Nack), San Francisco County (Peskin), U.S. Environmental Protection Agency (Schwinn), and State Lands Commission (Thayer).

3. **Public Comment Period.** Jeff Harrison stated he addressed the Commission two and half years ago regarding problems at Waldo Point Harbor. He made the following statement:

"I am the owner, since 1972 of a pile-supported residence that predates BCDC's jurisdiction and I have obtained all the necessary permits from the Bay Commission, State Lands Commission, and the County for the pile-supported residence. In my testimony two and a half years ago I brought to the Commission's attention the existence of pre-BCDC residential structures at Waldo Point Harbor that do not require Commission permit. The second issue I brought up was the requirement of the minor fill regulations for improving shoreline appearance. I am being stonewalled by BCDC's staff in resolving these issues. I have sent a number of letters to the staff and as yet I have not received any response and there have been no comments by staff during the environmental review process. I provided comments to the Commission from the 1983 regulations report for Richardson Bay that warned the Commission that houseboats, anchor-outs and live-aboard boats that have been moored at a particular location and used for residential purposes from a time predating BCDC jurisdiction would not be subject to BCDC fill control. This interpretation is consistent with BCDC's long standing position that areas of the Bay that have been filled prior to the existence of BCDC are not considered part of the Bay for purposes of the Commission's fill jurisdiction. I provided comment from former BCDC's director Alan Pendleton that was prepared in consultation with the Attorney General's office, that warned the Commission that they may not exercise jurisdiction over houseboats and other residential structures that were established before the Commission's permit authority became effective on November 10, 1969. In the same report BCDC Executive Director advised the Commissioners that houseboats used for residential purposes that predates the Commission's jurisdictional authority, that are in the same location then as now, and have not been physically changed significantly, do not need a permit from the



*Making San Francisco Bay Better*

**BCDC MINUTES**  
**August 7, 2003**

Mr. Travis doubted that the Commission will be able to afford more than one Commission meeting each month. He also believed that the Commission should accelerate its consideration of increasing the permit fees and every idea that anybody can come up with for cutting costs and stretching the resources should be looked at.

BCDC has to submit its budget and staff reduction plan to Sacramento next Monday. As soon as it is approved, staff will incorporate it into the work program to indicate exactly how the reductions will impact the Commission's ability to carry out its responsibilities. Mr. Travis hoped to have this work program available for the Commission's consideration at the September 4<sup>th</sup> meeting. However, even now it is clear that the work program for the current year will not be driven by Commission policy decisions, but rather by the grants and reimbursements that are available to pay for specific activities.

In the weeks ahead, the media to the degree it can turn its attention from the recall election, will be reporting that state agencies will be cutting their staffs between 25 and 40 percent. Because BCDC is a small department, and because Howard Iwata and Richard Ng, the Commission's budget analyst, have worked long hours with the senior staff over the past few days, staff has been able to quickly develop a creative and credible plan for meeting the requirements of the Budget Act with as few staff layoffs as possible. The outcome of negotiations with the employee unions may reduce the number of staff needed to be laid off. However, at this point in time, this cannot be counted on.

Commissioner Rice-Oliver proposed that the Commissioners join her in considering not accepting the expenses for the meetings. This small effort may help and support the staff who have done stellar work.

Commissioner Carruthers inquired how this could be done and Mr. Travis pointed out that any Commissioners could simply not sign the claim for the per diem.

b. **Montezuma Wetlands Project.** A report was sent dated July 25th containing the financial assurances that have been provided to satisfy the conditions in BCDC's permit for the Montezuma Wetlands Project in Solano County. As indicated in the report, staff intends to approve the financial assurance package unless the Commission directs otherwise.

c. **Vacation.** Mr. Travis reported he will be on vacation the last week and a half of August. Steve McAdam will be serving as acting executive director.

7. **Commission Consideration of Administrative Matters.** Steve McAdam was available to respond to any questions. There were no questions.

8 **Vote on New Ex Parte Communications Regulations.** Jonathan Smith recommended that the Commission adopt the proposed new regulations to implement the Ex Parte Communications policy. This is consistent with the substantive decision that the Commission made earlier this year. No comment was received on this.

**MOTION:** Commissioner Kondylis moved, seconded by Commissioner Lundstrom to adopt staff recommendation. The motion carried unanimously.

9. **Vote on Permit Application No 2-02; Mark Sanders; Westpoint Marina, in the City of Redwood City, San Mateo County.** Andrea Gaut referred the Commissioners to an errata sheet in the folder. The proposed project will be the first development in a salt pond, other than habitat restoration and the first since the acquisition of the Cargill salt ponds in the North and South Bays. Staff believes that the project, as conditioned, is consistent with the McAteer-Petris Act and the Bay Plan policies. In addition, staff believes that the Commission's approval of this project does not set a precedent that is applicable to many potential future development proposals in salt ponds. However, the staff does believe that the project is likely a limited precedent for future proposed marinas in salt ponds that have little habitat value. This is because the findings in the recommendation proposed to the Commission today are quite specific to this project. They spell out its water-oriented recreational benefits, that it is in a

portion of a salt pond that Cargill has determined is no longer needed in the salt production process, and that the site provides little habitat value.

Staff does not believe that this project alone would result in the abandonment or development of the adjoining Redwood City salt ponds. Any future proposed development of the Redwood City salt ponds would require the applicant to prove that the pond (or a portion of the pond) is no longer needed for the salt production process.

Staff expects to receive a material amendment from Cargill this fall that will outline its proposed future operations and maintenance needs as part of its consolidation system. At that time, it will be better understood how Cargill intends to use the remaining Cargill salt ponds and what may be in store for the Redwood City salt ponds retained in Cargill ownership.

Ms. Gaut then referred the Commissioners to the errata sheet.

The substantive changes that have been added to the recommendation include: (1) a special condition requiring the permittee to dedicate the open water areas at the marina while allowing the pile-supported and floating fill supporting the marina; and (2) a finding regarding the Commission's jurisdiction at the project site.

As staff prepared the recommendation it was determined that staff could not find the proposed project consistent with the Bay Plan policies on salt ponds unless a special condition was added that would require the dedication of all or most of the remaining open water areas. This special condition was added through an errata sheet rather than within the recommendation itself in the interest of not delaying the Commission vote for the project and thus to meet Mr. Sander's schedule. Specifically, this special condition was added to be consistent with salt pond policy number three, which states that if the pond is proposed for development "[j]ust as the dedication of streets, parks, etc., is customary in the planned unit development and subdivision laws of many local governments, dedication of some of the pond or marsh areas as open water can and should be required as part of the development." In addition, salt pond policy number three states that "[d]evelopment of the ponds...should provide for retaining substantial amounts of open water..." Staff believes that to find the project consistent with these policies, the remaining areas of open water within the marina basin must be dedicated as open space.

Finally, the errata contains a finding regarding the Commission's jurisdiction at the site. Again, when the staff recommendation was mailed last week, staff realized that further discussion with the Attorney General's office was necessary. In the interest of time, the staff recommendation was mailed with a draft finding on the Commission's jurisdiction at the site. The new finding contained in the errata sheet explains that the site will continue as part of the Commission's salt pond jurisdiction in part due to Regulation Section 10710, which states that areas once subject to Commission jurisdiction remain subject to that same jurisdiction even if filled or otherwise artificially altered.

The applicant would like to make a change in the last finding just discussed regarding the finding for the Commission's jurisdiction. In the beginning of the second sentence, errata sheet, page 4, paragraph (G) Commission Jurisdiction, starting *"the parcel that is the subject of this permit satisfied those criteria and therefore the Commission believes that the parcel is and will continue to be within the Commission's salt pond jurisdiction."* The applicant would like to add the term *"the Commission believes that the parcel."*

Ms. Gaut indicated that the applicant would like to address the Commission about the special condition that would require that the marina water basin be reserved as open space.

Commissioner Morrison inquired if this change would be a substantive change in the finding.

Joel Jacobs did not think that from the AG's perspective it would make a significant difference. The applicant is concerned that it might somehow be bound by all the findings being

made, including a purely legal interpretation. If this issue were ever to come up in a disputed fashion, the Commission's jurisdiction would be what it is.

Mark Sanders, the applicant stated that this would make it more difficult because these conditions were just brought up yesterday. Mr. Sanders had no problem with the continuing 100% BCDC jurisdiction over the marina basin and/or the entire marina. His expressed concern with respect to the salt pond policy as this is in a state of rapid flux. As time goes forward and discussions with Cargill go forward, there is no telling what the implications would be. Mr. Sanders said he needed to know that the marina would stay in tact as it is today and consistent with current policy. Salt Pond policies in the future might be different. The McAteer-Petris Act defines salt pond as "diked away from the Bay and non tidal." With respect to open space, the entire marina is dedicated to the public. It is all water oriented. Of the 24 acres upland, anything that is not riprap or a building or boatyard is already public access. More than seven acres are public access, that is 40% of all the land. To now come back and also take the pond which had been considered not open water because of the boats and docks and dedicate the pond as open space seems inconsistent 24 hours before the vote. The project is incredibly generous in public access. BCDC has full control over it. The Commission is now requiring the applicant to dedicate the marina to open space, to file a document with the county adds more cost and complications to the process. He urged that the Commission vote for the project as presented two weeks ago.

Mr. Travis apologized for getting this material to the applicant so late. As staff explained, in an effort to expedite this and to resolve all the issues, the staff recommendation was put out in a preliminary fashion. Clearly, time is needed to address some of the things Mr. Sanders stated, but substantively and legally the statements are incorrect. Once these can be explained to the applicant he may understand why it is necessary to reserve and dedicate the basin to be consistent with BCDC's policies. If it is not dedicated the Commission cannot approve the project.

Similarly, a salt pond is legally defined as an area that was used for salt production on a certain date back in 1965. This was and always will be so and the Commission would have to change the law to change the definition of a salt pond. This can be worked out and a vote on this project can be delayed for another month while still meeting the 90 day deadline.

A discussion followed on this subject.

Mr. Travis stated that Mr. Sanders has raised concerns about this area being in the Commission's salt pond jurisdiction and salt pond policies applied to it. The Commission is updating those policies and the concern is about what they will be. A large portion of the salt ponds have recently been acquired by the government and will be restored to wetlands. Staff is looking, as part of the policy basis, to see: (1) whether staff should be looking at changes in the law to change that jurisdiction; or (2) having two kinds of policies. One policy that applies to salt pond jurisdiction used for salt production, and secondly, policies that apply to areas in the Commission's salt pond jurisdiction that have either been restored for wetlands or used for marinas. Mr. Sanders' concern is one that will be addressed by the policy update.

Mr. McAdam pointed out that the applicant has proposed language that staff believes is acceptable to answer that question.

Commissioner Carruthers felt that it is important to have the water area dedicated. This is important for the Commission's long term program.

Mr. McAdam clarified that if the open water basin is preserved in the way the staff has suggested, Mr. Sanders will be able to build his marina, make minor changes in the square footage of the docks and floats, as well as maintain riprap along its banks. He delineated the desire for the project to move forward, while retaining the open water basin which is a requirement of the salt pond policy. If Mr. Sanders wishes to change the project and do something else with the site, he will have to come back and obtain a permit that will address the



open water basin, which is reserved for open water purposes. The permit could be a changeable document if Mr. Sanders comes back with a project that is acceptable by this, or a future Commission, who can then have the option to change the open water restriction.

Commissioner Morrison suggested that if the Commission approves the permit as recommended in this meeting and the marina is built and operated, what is done to the salt pond jurisdiction in future will have no impact on this proposed project, only on any changes in use of the site that might come about in the future.

Commissioner Waldeck asked staff what the process is for revising the staff recommendation prior to the Commission's vote.

Mr. McAdam clarified that in this case the staff is changing the recommendation to the Commission by correcting errors, as well as making adjustments that were made as a result of further discussions with the applicant. In addition, the revisions included a finding regarding the Commission's jurisdiction that staff needed more time to prepare and discuss with the Attorney General's office. Mr. McAdam stated that the staff can change their recommendation up to the point that the Commission votes on the proposal.

Mr. Travis pointed out that in this case the errata sheet is in fact a revision to the recommendation, the sheet is not correcting errors. Commissioner Waldeck asked staff why the Marina basin should be dedicated no open water?

In response to Commissioner Waldeck's question Mr. Travis stated that the Commission has adopted policies that say that the approval of any proposal in the area of a salt pond must have a substantial portion of the pond dedicated to open water. If the project does not include open water it can not be approved because it will not be consistent with the Commission's policies.

Staff believes the policy meets the requirements of dedicating the open water, yet there are enough exceptions to allow the proposed marina, enlarged and reconfigured with an infinitely maintained shoreline to be operated forever.

Commissioner McLeod indicated that he was in favor of the project along with the staff recommendation. The Commission cannot approve the project without open water conditions, therefore he was in favor of the staff recommendation as set forth in the revisions. He raised the question of sufficient parking being available as twelve public spaces did not seem adequate.

Ms. Gaut stated that there are 12 reserved spaces for members of the public only and the entire parking area is open to the public.

Commissioner Lundstrom recalled that the Alameda Marina Village marina has been there for years and it has dedicated open water space. The marina configuration has been changed a number of times, therefore this situation is not something new as a permit condition. She stated she was in favor of having open water space in conjunction with the Marina being able to make changes. She expressed concerns about the marina site filling up with sediment and possible dredging, especially regarding the Westpoint slough which is not dredged but scoured naturally. It is estimated that every ten years up to 50,000 cubic yards may need to be dredged. She wondered what the project depth was, as well as the depth of the slough.

Mr. Sanders stated that the slough, naturally at low water, is 8 or 9 ft. and therefore is navigable. In the Marina basin, because there are no streams or tidal flow into it, geo-technical reports as well as the experience of two similar basins within one mile show that the sediment is less than one foot every fifteen years. It will be at least thirty years before any dredging is anticipated.

Mr. Sanders stated that with the conditions and language outlined, this project is developable and will be able to move forward. The Marina is dedicated to open water. It 26.6 acres of water where 408 slips are allowed. The boats, the docks and perhaps the transit lanes

between the piers as well as the turning basin may not be considered open water. It seems now that that entire area needs to be dedicated. Because the area is dedicated, it needs to be documented in a different way, with descriptions, site plans and surveys adds expense to the project and is a difficult process.

Mr. McAdam clarified that the dedication of open water is more like a CC&R and is a document between the applicant and BCDC. It is not an easement dedicated to the city, nor is it fee to the state.

Commissioner Garlinghouse commented that this is a overwhelmingly important project in terms of benefit to the community. The McAteer-Petris Act was not created to hinder this kind of project with bureaucracy and legal maneuvers. The applicant has stated that this dedication would make it difficult and expensive for the applicant in the future.

McAdam agreed that the applicant will have some expense in preparing the conditions, covenants and restrictions that would be required, but not so much as to jeopardize the financing or economic viability of the project. The document is required by BCDC's policies.

Mr. Sanders agreed the project can move forward with the language suggested, but pointed out future problems.

Ms. Gaut added that the open water condition as written allows for minor amounts of fill for marina uses and public access as well as the reconfiguration of the entire marina. The condition requires a legal contract between BCDC and Mr. Sanders that has built in flexibility. This document would not have to be re-recorded by San Mateo County unless Mr. Sanders proposed a substantial increase in the amount of fill at the marina.

Commissioner Leonard stated he was prepared to support staff's recommendation with the modification the applicant suggested. The Commission is creating only a relatively limited, one-time burden which the applicant has the choice of incurring or going potentially another year on this project. The distinction between being consistent with BCDC's policies and being inconsistent with BCDC's policies is not a semantic distinction.

Commissioner Rose revisited the haul-out area and asked where the boats were being hauled out to. On the map it looks like nine different required view corridors have been converted to view opportunity areas. She asked for an explanation of the difference between the two.

Ms. Gaut agreed that portions of the site plan were dropped out. The recommendation required only four view corridors. There is essentially no difference between a view corridor and a view opportunity area, but staff reserved what it felt are the most important view corridors. The applicant showed the haul-out and boatyard area on the map. A further discussion along these lines followed.

Commissioner Hill stated that as San Mateo County's representative to BCDC, he found this project to be a wonderful asset for the Bay and for the County. He also thought that it is important for the Commission to maintain a consistency in policy application.

**MOTION:** Commissioner McLeod moved, seconded by Commissioner Kondylis to adopt staff recommendation.

Chair Kaufman asked Mr. Sanders if he was in agreement with staff recommendation. Mr. Sanders agreed to the staff recommendation.

**VOTE:** The motion carried with a roll call vote of 17-0-0 with Commissioners Bates, Bell, Leonard, Hill, Carruthers, Kondylis, Lundstrom, McLeod, Gus Morrison, Rice-Oliver, Rippey, Rose, Garlinghouse, Sweeney, Waldeck, Vice Chair Halsted and Chair Kaufman voting "YES", no "NO" votes and no abstentions.